PLEADING: JOINDER OF INCONSISTENT COUNTS FOR SINGLE CAUSE OF ACTION.—In states which have adopted the reformed system of procedure there is uniformly a provision that the complaint shall state the cause of action in ordinary and concise language. It was thought that this provision would do away with the use of the common counts, but, as noted in a previous number of this Review, the only effect in California was to strip the common counts of some of their fictitious allegations.[1] It was also thought that this section would do away with the practice of charging in various and usually inconsistent counts for a single cause of action.[2] Under the common law, this practice was prevalent, and to a large degree necessary, in order to remove the possibility of a variance. Since the complaint under the reformed systems of procedure need only state the ultimate facts upon which the plaintiff relies for his relief, and since variances can easily be remedied through amendments, it would seem that in theory the necessity for using several counts has wholly disappeared.

The indiscriminate use of different counts for a single cause of action is not permitted by some of the so-called code states.[3] The plaintiffs in such states will be required to elect upon which count he will proceed. It has, however, been held that where it becomes advisable for the plaintiff to proceed along inconsistent theories, as where the facts are not known, or are peculiarly within the knowledge of the defendant, he may properly proceed against the defendant in inconsistent counts, though admittedly he has but a single cause of action.[4]

As yet there has been no distinct adjudication in California that inconsistent counts may be used in all situations. Their use has of course been allowed where the facts were peculiarly within the knowledge of the defendant.[5] It has also been allowed where the plaintiff was reasonably in doubt as to his safety in proceeding by means of any one count because the facts as a whole were unknown to either party, and it was considered desirable to let the

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[1] 4 California Law Review, 352.

[2] "If the plaintiff have different causes of action he may of course, and should set them forth, but he should not set forth the same cause of action in different forms." Manual of Code Procedure by David Dudley Field, reprinted in Fairall's Cal. Code Civ. Proc. p. 333.

[3] Matz v. Chicago & A. R. Co. (1898), 88 Fed. 770, "such pleading makes chance medley insteady of a plain and concise statement of the facts constituting the cause of action required by the (Missouri) Code;" Reed v. Poindexter (1895), 16 Mont. 294, 40 Pac. 596; Harvey v. S. P. Co. (1905), 46 Ore. 505, 80 Pac. 1061; Sturges v. Burton (1858), 8 Oh. St. 215, 72 Am. Dec. 582, and note. See generally, Bliss, Code Pleading (3rd. ed.) § 119; Pomeroy, Code Pleading, § 467.

[4] Willard v. Carrigan (1902), 8 Ariz. 70, 68 Pac. 538; Vindicator etc. Co. v. Firstbrook (1906), 36 Colo. 498, 86 Pac. 313; 10 Ann. Cas. 1109; Spotswood v. Morris (1904), 10 Idaho, 129, 77 Pac. 216; Jones v. Palmer (1855), 1 Abb. Pr. 442; Whitney v. Chicago & N. W. Ry. Co. (1870), 27 Wis. 327.

[5] Rucker v. Hall (1895), 105 Cal. 425, 38 Pac. 962.

plaintiff avail himself of whatever the evidence produced at the trial might show,[6] or because he was uncertain as to the precise nature of his right under the circumstances.[7] It has also been allowed even where the facts were apparently known to the plaintiff, in cases where one count in effect included another, as where a count on an express contract was coupled with one on an implied contract.[8]

Intimations have been thrown out that the use of inconsistent counts would be permitted in any situation,[9] the most recent and the strongest of which is in the case of *Tanforan v. Tanforan*[10] in which the plaintiff was forced to elect after he had presented his evidence and on his appeal from the judgment, attacked the order compelling the election. The appellant did not prevail because no injury could be shown on account of the fact that the evidence offered would not have supported the count which was rejected. In disposing of the case, however, the court declared that the order enforcing the election was erroneous, and that inconsistent counts could be used "when for any reason the pleader thinks it desirable so to do."

The tendency of the California courts to allow the use of inconsistent counts is perhaps most forcibly shown by the fact that the defendant has no effective means of attacking them. Such a complaint is good against general demurrer,[11] and against special demurrer,[12] for it cannot be shown that a particular count is uncertain by reference to another count. The plaintiff cannot be compelled to elect before the trial upon which count he will proceed[13] because as noted above, he may at that time be in doubt as to his rights in the matter; nor can he under the Tanforan case be forced to elect upon which count he relies after his evidence is in, for he cannot be asked to hazard a guess as to which case he has made out, this being a matter for the jury or for the judge on a motion for a nonsuit on any of the counts.[14]

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[6] Froeming v. Stockton R. R. Co. (1915), 171 Cal. 401, 153 Pac. 712.

[7] Van Lue v. Wahrlich-Cornett Co. (1910), 12 Cal. App. 749, 114 Pac. 411.

[8] Wilson v. Smith (1882), 61 Cal. 209; Cowan v. Abbot (1891), 92 Cal. 100, 28 Pac. 213; Estrella Vineyard Co. v. Butler (1899), 125 Cal. 232, 57 Pac. 980; Remy v. Olds (1893), 4 Cal. Unrep. Cas. 240, 34 Pac. 216.

[9] Stockton Combined Harvester etc. Co. v. Glens Falls Ins. Co. (1898), 121 Cal. 167, 171, 53 Pac. 565, "Besides we see no reason why a cause of action arising out of the same transaction may not be separately stated in different ways, even though they are inconsistent with each other. The defendant is permitted to plead inconsistent defenses, and there can be no good reason why the same rule should not apply to different counts of a complaint as well as to the answer." Cowan v. Abbot, supra, n. 8, "Theoretically there are distinct causes of action, and there is no requirement that they shall correspond to, or be consistent with each other."

[10] (Aug. 8, 1916), 52 Cal. Dec. 251, 158 Pac. 709.

[11] Murphy v. Crowley (1903), 140 Cal. 141, 73 Pac. 820.

[12] Stockton Combined Harvester etc. Co. v. Glens Falls Ins. Co., supra, n. 9.

[13] Wilson v. Smith, supra, n. 8; Estrella Vineyard Co. v. Butler, supra, n. 8; Remy v. Olds, supra, n. 8.

[14] See also Van Lue v. Wahrlich-Cornett Co., supra, n. 7.

Convenient as the use of inconsistent counts may be in some situations, it must be recognized that their use is not in accordance with the spirit of the reformed procedure. Moreover it would seem that their indiscriminate use might in many cases impose an unnecessary burden upon the defendant. This burden, however, becomes more apparent than real, if, as suggested by the principal case, he may at the conclusion of the plaintiff's case move for a nonsuit on any count not adequately supported by the evidence presented. Given this right on the part of the defendant, there seems no forcible reason to deny the use of inconsistent counts in all situations, especially since the defendant always has the privilege of pleading inconsistent defenses.[15]

M. W.

PUBLIC SERVICE COMPANIES: POWER OF COMMISSION TO COMPEL CONSTRUCTION OF BRANCH LINES.—Is a railroad company's dedication of property to public use limited to the territory immediately traversed by its rails, or does it extend to outlying areas which cannot be directly served except by means of additional lines? And has power been conferred upon the Railroad Commission to compel the construction of additional lines and afford service in a new field under the California Public Utilities Act, which purports to give the Commission power to compel a public utility to make "additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility . . . . to promote the security or convenience of its employees or the public?"[1] In *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of the State of California,*[2] the Supreme Court of California holds that the obligations of a railroad company do not extend beyond the field of original dedication and that an order compelling the construction of an additional line constitutes a taking of property and is beyond the Commission's powers. The Commission's order in Cabrillo Club v. Atchison, Topeka & Santa Fe Railway Company[3] is annulled.

The complainants before the Commission sought the restoration of a line of railroad from Oceanside to Temecula, a portion of which, approximately twelve miles in length extending from Fallbrook to Temecula, had been abandoned for more than twenty years. Such an abandonment with the consent of the state works a forfeiture of all rights and necessarily destroys correlative obligations.[4] Accordingly, upon the facts of the case, the issue is

[15] Bell v. Brown (1863), 22 Cal. 671; Banta v. Siller (1898), 121 Cal. 414, 53 Pac. 935; Eppinger v. Kendrick (1896), 114 Cal. 620, 46 Pac. 613.

[1] Public Utilities Act, § 36, Cal. Stats. 1915, pp. 115, 134.
[2] (Oct. 23, 1916), 52 Cal. Dec. 485, 160 Pac. 828.
[3] (1915), 8 Cal. Rr. Comm. 74.
[4] Home Real Estate Co. v. Los Angeles Pacific Co. (1912), 163 Cal. 710, 126 Pac. 972; Public Ser. Comm. v. Philadelphia, B. & W. Rr. Co. (1914), 122 Md. 438, 89 Atl. 726.